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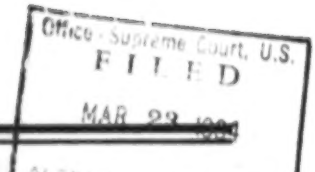

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS LOGIUDICE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

1.

Whether the Court of Appeals of Georgia properly concluded that the Petitioner did not have a reasonable expectation of privacy in the area where the marijuana was first discovered.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED. . . .	i
STATEMENT OF THE CASE. . .	1
STATEMENT OF THE FACTS . .	4
REASONS FOR NOT GRANTING THE WRIT	11
A. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS DISCOVERED	11
CONCLUSION	31
CERTIFICATE OF SERVICE . .	33

TABLE OF AUTHORITIES

Page(s)

Florida v. Brady, ___ U.S. ___, 102 S.Ct. 2266 (1982). . 13, 21

Hester v. United States, 265 U.S. 57 (1923) 12, 13, 20, 30

Katz v. United States, 398 U.S. 347 (1967) . . . . . passim

LoGiudice v. State, 164 Ga. App. 709 297 S.E.2d 499 (1982) . . 3, 17

LoGiudice v. State, 251 Ga. 711, ___S.E.2d___ (1983) 3

Maine v. Thornton, ___ U.S. ___, 103, S.Ct. 1520 (1983). . . . 12, 23

Oliver v. United States, ___ U.S. ___, 103 S.Ct. 812 (1983) . . 13, 25

State v. Brady, 379 So.2d 1294 (Fla. App. 1980) 21

State v. Thornton, 453 A.2d 489 (Me. 1982). 24

United States v. Dunn, 674 F.2d 1093 (5th Cir. 1982) App. No. 82-508, cert. pending, 52 U.S.L.W. 3067 . . . . . 28, 29

United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc) 27

United States v. Oliver, 657 F.2d 85 (6th Cir. 1981) 26

United States v. Williams, 581 F.2d 451 (5th Cir. 1978) 15

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PART ONE

STATEMENT OF THE CASE

Petitioner, Thomas LoGiudice, was indicted and tried in the Superior

Court of Upson County, Georgia. Petitioner was indicted for the offense of possession of more than one ounce of marijuana with intent to distribute in violation of the Georgia Controlled Substances Act. Prior to trial, a motion to suppress was filed and a hearing was conducted on that motion. After considering the evidence, the trial court denied the motion to suppress. Petitioner was convicted at a bench trial and sentenced to serve five years imprisonment followed by five years on probation.

Petitioner subsequently filed an appeal to the Court of Appeals of Georgia challenging his conviction in the instant case. On appeal, that

court addressed numerous issues, including the denial of the motion to suppress. The appellate court affirmed the trial court's decision as to the motion to suppress. LoGiudice v. State, 164 Ga. App. 709, 297 S.E.2d 499 (1982). The Supreme Court of Georgia denied certiorari on January 26, 1983. On rehearing, the Supreme Court of Georgia reversed that decision and granted the writ. After briefing and oral argument, the Supreme Court of Georgia vacated the order granting certiorari, LoGiudice v. State, 251 Ga. 711, ___S.E.2d___ (1983) with Justice Smith dissenting. The instant petition was then filed in this Court.

STATEMENT OF THE FACTS

In 1979, Petitioner purchased a three hundred and forty-five acre tract of land bordering on Georgia Highway 74 in Upson County, eight miles east of Thomaston, Georgia. In the summer of 1980, Upson County Sheriff Merill Greathouse began receiving reports of activity on the Petitioner's land. The owner of a local package store located on Highway 74 near the property told the Sheriff he had heard heavy earth moving equipment operating at night on the land. Another unidentified source reported that in the fall of 1980, Petitioner had hired a local contractor to dig a well on the land, and had directed the contractor to lay

water pipe from the well some three hundred yards to heavy woods. Petitioner unexplainedly discharged the contractor, saying that he would complete the job himself.

Based on this information, Sheriff Greathouse entered Petitioner's land sometime in the fall of 1980 to search for illegal marijuana plants. At the hearing on Petitioner's motion to suppress, the sheriff admitted to climbing both barbed wire and welded fences when entering Petitioner's property. The sheriff searched the area surrounding Petitioner's trailer but found no marijuana. Later that fall Sheriff Greathouse conducted an aerial search of Petitioner's land. He again was unable to detect any

illegal activity, but noticed that Petitioner was constructing a new fence around his land.

On July 6, 1981, acting on a tip from an unidentified source, the sheriff and several G.B.I. agents entered Petitioner's land without a warrant to search for marijuana. According to Sheriff Greathouse, the group entered by a back route by crossing a creek, climbing a barbed wire fence and following an old logging road some two hundred yards until they reached a clearing. There they discovered a half acre field of marijuana. The plants were surrounded by chicken wire fencing and were plainly visible from a distance of ten feet or less. A thirty-five foot path

led from the field through dense undergrowth to a travel trailer owned by the Petitioner.

The officers conducted a stake-out of the field, remaining four and one-half to six hours. No arrests were made at that time. The officers returned to the field on the morning of July 7, 1981 and observed the Petitioner and two co-defendants in the field. A search warrant was obtained and the Petitioner and the two co-defendants were arrested.

The Court of Appeals of Georgia made certain factual findings in addressing the record. The court concluded the following:

> The officers discovered marijuana growing not

only in the half-acre plot near the Kenskill trailer occupied by Harms [co-defendant], but also in an area close to the trailer occupied by LoGuidice and his wife which was located on the lake approximately 1700 feet from the plot surrounded by the chicken wire fence. [Petitioner] is apparently relying upon the arrest of Ms. Harms to support his claim that the search was illegal because of an illegal search of the

curtilage of the trailer in which she lived. The evidence, however, shows that while [Petitioner] owned the trailer he resided in the trailer near the lake approximately 1700 feet from the large marijuana patch. He also contends that the agents were trespassing on his property as the land was posted and the gates were locked. The sheriff testified that only after surveillance of the property did he learn that the property

was posted and that the gates on the road leading to the property were locked.

Further facts will be developed as necessary for a more thorough examination of the issue which is presented by the instant petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS DISCOVERED.

Petitioner has urged this Court to grant the instant petition for a writ of certiorari based on the failure of the trial court to suppress certain evidence. The basis for this request by the Petitioner is an assertion that

the decision by this Court in Katz v. United States, 398 U.S. 347 (1967), narrowed the scope of the open fields doctrine set forth in Hester v. United States, 265 U.S. 57 (1924). Petitioner asserts that his intent to exclude the public was manifested by the various fences placed on the property as well as the locked gate and no trespassing signs. Petitioner has asserted that the Court of Appeals of Georgia adopted a per se approach to the open fields doctrine which was incapatable with Katz, supra. Petitioner also cites to four cases presently pending before this Court which he asserts should affect the disposition of the instant case. See Maine v. Thornton, ___ U.S. ___, 103

S.Ct. 1520 (1983); Oliver v. United States, ___ U.S. ___, 103 S.Ct. 812 (1983); United States v. Dunn, 674 F.2d 1093 (5th Cir. 1982), No. 82-508 cert. pending; Florida v. Brady, ___ U.S. ___, 102 S.Ct. 2266 (1982).

Respondent submits that there exists no reason for granting certiorari in the instant case as the Court of Appeals properly applied the open fields doctrine in light of the facts of the instant case. Factual findings made in this case clearly distinguish this case from other cases in that the facts do not show a reasonable expectation of privacy on the part of the Petitioner.

In this Court's opinion in Hester v. United States, 265 U.S. 57 (1923),

the Court noted that, "[a] special protection afforded by the Fourth Amendment to the people and their persons, houses, papers and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the common law." Id. at 59. Subsequently, in this Court's decision in Katz v. United States, 389 U.S. 347 (1967), this Court emphasized that the Fourth Amendment protects people not places. Under Katz there are two requirements that must be met, that is, that a defendant have exhibited an actual subjective expectation of privacy and that the expectation be one that society is prepared to recognize as reasonable. Katz, supra at 362.

In upholding the continued use of the open fields doctrine, the Fifth Circuit Court of Appeals noted that "although the expectation test has done away with outmoded property concepts no longer satisfactory for Fourth Amendment analysis (cites omitted), a distinction between open fields and curtilage is still helpful in determining the existance or not of a reasonable privacy expectation." United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978). The court went on to note that it still would hold that the open fields surrounding the house would not be protected under the Fourth Amendment.

In examining the situation in the instant case in light of a

determination as to whether certiorari should be granted, this Court should examine the facts of the case and the applicability of the open fields doctrine to those facts. In the instant case the trial court, as the finder of fact, found the facts such that the search and seizure of the marijuana should be upheld. As noted by the Court of Appeals of Georgia, the officers found two patches of marijuana, one close to the trailer occupied by the co-defendant and another patch approximatly 1700 feet from the trailer in which the Petitioner was living. As the Court of Appeals of Georgia stated regarding Petitioner's argument that the field adjacent to the Kenskill trailer was

within the curtilage of a dwelling," he could not have any expectation of privacy in a dwelling in which he does not reside and it is well established that the Fourth Amendment protects people, not places against unreasonable searches and seizures." LoGiudice v. State, 164 Ga. App. at 710. Therefore, the court concluded that the search and subsequent finding of the marijuana fields on the property was authorized under the open fields doctrine.

In examining Petitioner's allegation that he had a reasonable expectation of privacy in the areas in which the marijuana was found, it is important to note that while the Petitioner did own the land and

trailer on which the small field of marijuana was found, the Petitioner did not reside in that trailer and was actually at a distance of some 1700 feet away from the other larger fields of marijuana. Thus, both fields found by the arresting officers could not, under any reasonable definition, be found to have been within the curtilage of the Petitioner's residence. Therefore, it cannot be stated that the Petitioner could have a reasonable expectation of privacy for both such fields as neither was located near or adjacent to his residence.

The Court of Appeals also found the following facts: "The Sheriff testified that only after a

surveillance of the property did he learn that the property was posted and that the gates on the road leading to the property were locked." Katz, supra. Thus, the facts of this case clearly indicate that the officers received no notice which would give them any idea that the Petitioner had closed this particular portion of the property to the public. Thus, it cannot be said that Petitioner fully exhibited a subjective expectation of privacy.

Based on an examination of all the evidence, Respondent asserts that the Court of Appeals of Georgia correcty concluded that Petitioner had no reasonable expectation of privacy in the marijuana fields located near the

co-defendant's trailer. Even if the decision of this Court in Katz v. United States, supra, has narrowed the open fields doctrine, the Court of Appeals of Georgia properly applied the standards of Katz, in conjunction with the holding of Hester.

The cases cited by the Petitioner which this Court previously stated that it will hear, are sufficiently distinguishable from the facts of the instant case for this Court to conclude that a granting of certiorari is not warranted in the present case. As each case must turn on its unique facts, it is necessary to examine the underlying factual circumstances behind each case involved.

This Court has granted certiorari in Florida v. Brady, ___ U.S. ___, 102 S.Ct. 2266 (1982). The factual circumstances in that case involve a forced entry by deputies onto 1800 acres of land which were clearly fenced, locked, occupied and posted. The Florida courts noted that the deputies had to cross a dike, ram through a gate, and cut a chain lock as well as cross several posted fences in order to reach the area in question. See State v. Brady, 379 So.2d 1294 (Fla. App. 1980). The Florida District Court of Appeals excluded the evidence based on the total encirclement of the property and the "no trespassing" signs that were present. The court concluded that

there was clearly an expectation that no one would enter the property.

The Florida Supreme Court also concluded that the search was improper based on the facts of that particular case. The court concluded that there was a clearly demonstrated expectation of privacy and found that under the facts of that case it was reasonable. State v. Brady, 406 So.2d 1093 (Fla. 1981). Therefore, that case presents a circumstance factually distinguishable from the instant case, as Brady exhibited, through the numerous fences, gates and signs, a far greater subjective expectation of privacy than the Petitioner in this case.

This Court has also granted certiorari in Maine v. Thornton, ___ U.S. ___, 103 S.Ct. 1520 (1983). That case involved a situation in which officers walked across a defendant's property between a mobile home and adjacent house. The officers followed a woods road which was being used as a footpath. The marijuana was found growing in a clearing surrounded by chicken wire. It was noted that the area was heavily wooded. The court noted that there had been an old stone wall surrounding the area, as well as an old barbed wire fence and "no trespassing" signs around the perimeter of the property, including the area where the woods road entered the defendant's property. The court

based its decision on the fact that this was a secluded location and there were many efforts made to exclude the public. The court found that these facts evidenced a reasonable expectation of privacy. The court specifically based its decision on factual findings and the fact that the officers went part way up the defendant's driveway. State v. Thornton, 453 A.2d 485 (Me. 1982). The court granted the motion to suppress in this case, on facts similar to the facts of the instant case. The government applied for and has been granted a writ of certiorari by this Court. Thus, in Thornton, supra, the government is seeking to appeal a granting of the motion to

suppress whereas in this case, the Petitioner is seeking a writ of certiorari to review a denial of the motion on similar facts.

The third case cited by the Petitioner is Oliver v. United States, ___ U.S. ___, 103 S.Ct. 812 (1983). In that case, detectives drove past the defendant's residence for approximately three quarters of a mile to a barn. At that point the detectives were mistaken for hunters and were specifically advised to leave the premises. The officers ignored the warning and continued across the property. There was a private road blocked by a locked gate with a "no trespassing" sign posted on the gate. This was the fourth such sign that had

been seen by the officers while crossing the farm. Two officers then slipped through a hole in the gate and continued on foot for another quarter of a mile across the farm. United States v. Oliver, 657 F.2d 85 (6th Cir. 1981). In that case, the panel of the Sixth Circuit initially concluded that the expectation of privacy was objectively reasonable based on the facts of that case. Subsequently, the Sixth Circuit Court of Appeals considered the case en banc. That court examined the facts of the case in light of Katz v. United States, supra. The court found that general principles of the Fourth Amendment did not protect an open field of marijuana. The court

concluded that it would protect a person in an open field house built there, but not the field itself. Therefore, the en banc decision concluded that there was no Fourth Amendment violation. United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc). That case rests solely on the facts of the case and the en banc court's apparent conclusion that no facts could serve to find a reasonable expectation of privacy in an open field. No such conclusion was reached by the Court of Appeals of Georgia in the instant case. The Georgia court specifically concluded there could be no reasonable expectation of privacy in this case. Therefore, Respondent submits that the case of United States

v. Oliver is not similar to the present case and does not justify the granting of the petition for a writ of certiorari.

The fourth case cited by Petitioner is United States v. Dunn, 674 F.2d 1093 (5th Cir. 1982) App. No. 82-508, cert pending, 52 U.S.L.W. 3067. In that case, drug enforcement agents and other law enforcement officials had conducted an ongoing investigation into the possible making of illegal drugs by certain individuals in Texas. As part of their investigation, the agents entered a ranch and conducted an investigation of a barn located on the property adjacent to the defendant's house. The Fifth Circuit Court of

Appeals found that the fence around the ranch was complete and intact and that the barn that was investigated was itself circled by another substantial fence. The court thus found that the barn was within the curtilage of the residence and was within the protective ambit of the Fourth Amendment, and therefore the owner had a reasonable expectation of privacy in the barn. That case is factually distinguishable from the instant case. The area searched in the Dunn supra, was within the confines of a barn and not an open field. That fact alone clearly distinguishes it from the instant case. Secondly, the barn was located immediately adjacent to the dwelling

house of the defendant, both of which were enclosed by wire fences. Therefore, that case presents a circumstance factually distinguishable from the instant case.

Respondent submits that the open fields doctrine set forth by this Court in Hester v. United States, is still viable even in light of Katz v. United States. Even if this Court were to determine that the open fields doctrine should be narrowed in its scope, no reason exists to grant certiorari in the instant case as the Court of Appeals of the State of Georgia did apply a narrowed approach to the question by utilizing the reasonable expectation of privacy test set forth in Katz v. United States.

As the Court of Appeals correctly applied the decisions of this Court, no federal constitutional issue exists which would justify the granting of a writ of certiorari.

CONCLUSION

For all the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Thomas LoGuidice.

Respectfully submitted,

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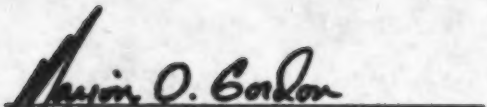

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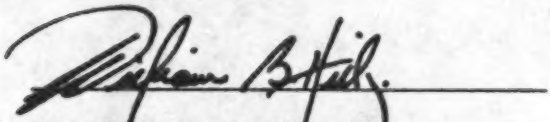

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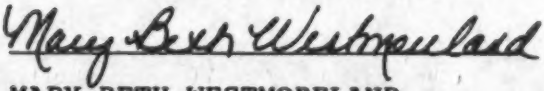

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, attorney of record for the Respondent and a member of the Bar of the Supreme Court of the United States hereby certify that in accordance with the rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief In Opposition for the Respondent upon the Petitioner's attorney by depositing three copies of said brief in the United States mail with proper address and adequate postage to:

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This 21st day of March, 1984.

/s/
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